84-1594

No. .....

Office - Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1984

HOWARD ERIC GENSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

EMERSON BROOKS SEMPLE
Attorney for Petitioner

1570 Emerson Street
Denver, Colorado 80218
(303) 832-6777

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

Whether acquittal of the Petitioner for the charges of Conspiracy to Distribute and Distribution of Cocaine, in violation of 21 U.S.C. § 841(a) (1), precludes his subsequent prosecution for Aiding and Abetting the Possession with Intent to Distribute Cocaine in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a) (1).

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals opinion entered February 12, 1985, affirming the judgment of the District Court partially denying Defendant's Motion to Dismiss.

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OPINIONS BELOW

The Sixth Circuit Court of Appeals entered its opinion affirming the decision of the Honorable Ralph Freeman, District Court Judge in and for the Eastern District of Michigan, denying part of the Petitioner's Motion to Dismiss, on February 12, 1985. Pursuant to Local Rule, the affirmance of the District Court opinion was rendered from the bench and no official opinion was issued or reported. No petition for rehearing was filed in the Sixth Circuit Court of Appeals. A timely Motion for Stay of Mandate, pursuant to Local Rule 15 of the Rules of Appellate Procedure for the Sixth Circuit Court of Appeals, was filed on February 15, 1985. A stay of mandate was issued by the Sixth Circuit Court of Appeals on the 5th day of March, 1985.

Since there was no opinion issued by the Sixth Circuit Court of Appeals, no copy is attached. However, a copy of the Order issued by the Honorable Ralph Freeman, District Court Judge for the Eastern District of Michigan, is set out in Appendix B. The Petitioner's Motion to Dismiss is set out as Appendix A.

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JURISDICTIONAL STATEMENT

Since this Petition is being filed within 60 days of February 12, 1985, it is timely. Jurisdiction of this Court is envoked under 28 U.S.C. § 1254.

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FACTUAL STATEMENT

The Petitioner was previously charged in the United States District Court for the District of Colorado with Conspiracy to Distribute a Controlled Substance, in violation of 21 U.S.C. § 846, and Dispensing a Controlled Substance in violation of 21 U.S.C. § 841(a) (1), in case number 82-CR-134. The Colorado Indictment charged Petitioner with Dispensing a Controlled Substance on January 19, 1982, in Count I; Dispensing a Controlled Substance on February 4, 1982, in Count II; Dispensing a Controlled Substance, Cocaine, on May 18, 1982, in Count III; and Dispensing a Controlled Substance on May 19, 1982, in Count IV; and in Count V, charged the Petitioner and another with conspiring with other persons, whose true identity to the Grand Jury was unknown, to Dispense a Schedule II Substance, Cocaine, in violation of 21 U.S.C. § 846 and § 841(a) (1). At trial the Court granted the Petitioner's Motion to Dismiss and ordered that all Counts of the Indictment be dismissed.

Thereafter, the United States brought a second Indictment in Colorado against the Petitioner in Criminal Action number 82-CR-200 based upon the same criminal transaction as in the Indictment in 82-CR-134. Upon a

direct appeal to the Tenth Circuit Court of Appeals, the second Indictment was ordered dismissed in the *United States of America v. Howard Eric Genser,* 710 F.2d 1426 (Cir. 10, 1983).

Subsequently, the Petitioner was Indicted in the United States District Court for the Eastern District of Michigan Southern Division in Criminal Action number 83-60550. Count I of the Indictment charged the Petitioner with Conspiracy to Possess with Intent to Distribute; and Distribution of Cocaine in violation of 21 U.S.C. § 841(a) (1) and § 846. Count I of the Indictment alleged 80 overt acts committed in furtherance of the Conspiracy. Two of the overt acts charged in the Indictment alleged the same transactions and activity by the Petitioner for which he was tried, and charges were dismissed, in the District of Colorado in case number 82-CR-134. The Petitioner was also charged in three other counts of the Indictment, alleging Possession with Intent to Distribute Cocaine, in violation of 21 U.S.C. § 841(a) (1) *and* Aiding and Abetting in violation of 18 U.S.C. § 2 (charged in the conjunctive in all three counts).

Further, all charges involved co-conspirators named in Count I of the Indictment and all of the overt acts alleged in the Michigan Conspiracy, as well as the substantive offenses alleged in the Michigan Indictment, took place during the time period alleged in the Colorado Indictment.

The Petitioner filed a Motion to Dismiss and Memorandum in Support of Motion to Dismiss on the grounds that the prosecution of Count I of the Indictment was barred by the Double Jeopardy Clause of the Fifth Amend-

ment to the United States Constitution, and the prosecution of the Counts alleging Aiding and Abetting the Possession with Intent to Distribute Cocaine were barred by the Double Jeopardy Clause and the Doctrines of Collateral Estoppel and *res judicata* as announced by the United States Supreme Court in *Ashe v. Swenson,* 397 U.S. 436 (1970).

On January 25, 1984, the Honorable Ralph Freeman issued a Memorandum Opinion with respect to the Petitioner's Motion to Dismiss. After careful deliberation and application of the principles applied in *United States v. Jabarra,* 644 F.2d 574 (Cir. 6, 1981) and *United States v. Sinito,* 723 F.2d 1250 (Cir. 6, 1983). The court dismissed the Conspiracy charge contained in Count I and further ruled that no evidence of the Conspiracy or concert of action among the co-conspirators alleged in Count I could be used against the Petitioner at trial.

Subsequently, the Petitioner pled guilty to Count VI of the Indictment and reserved the right to appeal the partial denial of his Motion to Dismiss.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution in pertinent part provides,

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

REASONS FOR GRANTING THE WRIT

The question presented by this Petition requires the attention of this Court in order to ensure that rights guaranteed by the Fifth Amendment to the United States Constitution, as well as Rules 18 and 20 of the Federal Rules of Criminal Procedure are not violated by successive prosecution for the same behavior.

This question deals with the ability of the United States Government, with almost unlimited time and resources, to have knowledge of a wide range of criminal conduct by a putative defendant and to selectively charge portions of that conduct at separate times in order to require that Defendant to defend himself at several places and times for the same or similar conduct. See *United States v. Borshardt,* — U.S. —, #831643 (1984). This question is increasingly coming to issue in the area of Task Force* investigations which involve wide ranging information gathering across multi-jurisdictional and multi-national lines, requiring application of the doctrine announced in *Ashe v. Swenson, supra,* regarding the charging of all offenses known to the prosecutor at the time of charging the defendant.

More substantively, the question before this Honorable Court involves the issue as to whether the crime of Aiding and Abetting in violation of 18 U.S.C. § 2 may be proven without evidence of concert of action among those accused under that section. More importantly, even if the crime of Aiding and Abetting, in violation of 18 U.S.C. § 2, could be proven, may it be charged in light

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* Organized Crime Drug Enforcement Task Force Program

of the previous acquittal of the Petitioner of the Conspiracy for which this Petitioner was charged with Aiding and Abetting an act during the furtherance thereof.

ARGUMENT

It is obvious that if the Colorado and Michigan Indictments had been brought simultaneously, the Petitioner could certainly have moved for their consolidation in a single district to resolve both cases in one proceeding. Petitioner has been prejudiced by Indictment successively in two Federal Jurisdictions for criminal conduct which occurred during the course of a Conspiracy for which he was acquitted in the District of Colorado. The prosecution admitted at pre-trial hearings in Michigan that it could not prove that the Conspiracy charged in Michigan was different than that charged in Colorado.

Though persons acquitted of Conspiracy may later be convicted of substantive crimes which have occurred during the course of that Conspiracy. See *United States v. Castro,* 629 F.2d 456 (Cir. 7, 1980). It does not follow that persons acquitted of a Conspiracy may later be charged with *Aiding and Abetting* (18 U.S.C. § 2) substantive offenses during the course of the Conspiracy. This is so because the evidence which must be shown to prove Aiding and Abetting is substantially identical to that which must be proven to show an agreement in Conspiracy cases.

Proof of the association or agreement between co-defendants is necessary to sustain a conviction under 18

U.S.C. § 2 Aiding and Abetting. If the only persons charged in the Aiding and Abetting count are also persons charged in the Conspiracy, then evidence of their concert of action and agreement may not be used in a subsequent trial of a person acquitted of the General Conspiracy. See *United States v. Castro, supra;* also see *Sealfon v. United States,* 332 U.S. 575 (1948). If evidence of concert of action among co-defendants is inadmissible, then the charge of Aiding and Abetting cannot be proven.

———o———

CONCLUSION

Clearly the manner in which the prosecution pled the Count to which the Petitioner pled guilty forecloses its proof by adherence to Judge Freeman's Order that evidence of the Conspiracy charges in Count I would not be admissible at a trial of any other Counts of the Indictment. Without the ability to show concert of action among defendants in the Aiding and Abetting Count (all of whom are also named in the Conspiracy Count which was dismissed), the government cannot prove Aiding and Abetting under 18 U.S.C. § 2 and is therefore barred by the Double Jeopardy clause and by the principles of Collateral Estoppel as applied to the Double Jeopardy clause from prosecuting the Petitioner for the substantive offense of Aiding and Abetting, Possession with Intent to Distribute Cocaine during the course of the Conspiracy for which he has previously been acquitted.

WHEREFORE, the Petitioner prays that this Honorable Court grant his petition for a Writ of Certiorari and that the judgment below should be reversed.

Respectfully submitted,

EMERSON B. SEMPLE
Attorney for Petitioner Genser

1570 Emerson Street
Denver, Colorado 80218
(303) 832-6777

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

(Filed December 21, 1983)

Case No. 83-60550

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD ERIC GENSER, et al.,

Defendants.

MOTION TO DISMISS I

COMES NOW the Defendant, above-named, by and through his attorney, Emerson B. Semple, and hereby moves this Honorable Court for the entry of an Order dismissing the Indictment in the above-captioned matter.

As grounds for his Motion, he states and alleges as follows:

1. That the Defendant is charged in Count I of the Indictment with violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846, CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE AND DISTRIBUTE COCAINE.

2. That among the overt acts listed in Count I of the Indictment, overt acts No. 70 and 71 allege that on January 19, 1982, and February 24, 1982, Howard Eric Genser did dispense a controlled substance, to wit: cocaine, a

Schedule II narcotic substance, all in violation of Title 21 U.S.C. § 841(a)(1).

3. That on August 31, 1982, the Honorable Jim R. Carrigan, Judge of the United States District Court for the District Court for the District of Colorado, entered an Order dismissing Criminal Action No. 82-CR-134.

4. That subsequently, Criminal Action No. 82-CR-200 was filed in the United States District Court for the District of Colorado.

6. Thereafter, the subject of the filing of Criminal Action No. 82-CR-200 became the issue on appeal in Case No. 82-2458 in the United States Court of Appeals for the Tenth Circuit in a case captioned, *United States of America v. Howard Eric Genser.*

7. That after briefing and oral argument, the United States Court of Appeals for the Tenth Circuit in an Opinion issued May 24, 1983, did in fact direct the trial court to dismiss Criminal Action No. 82-CR-200, charging the Defendant, Howard Eric Genser, with Distribution of Cocaine in violation of 21 U.S.C. § 841(a)(1) and Conspiracy to Distribute in violation of 21 U.S.C. § 846.

8. That the Defendant, Howard Eric Genser, also charged in Counts IV, VI and VII of the Indictment with violation of 21 U.S.C. § 841(a)(1) POSSESSION WITH INTENT TO DISTRIBUTE COCAINE and Title 18, Section 2, AIDING AND ABETTING.

9. That since Count IV, VI and VII of the Indictment are presumably related to the conspiracy which is charged in Count I of the Indictment, it is believed that Doctrine of Collateral Estoppel announced by the United

States Supreme Court in *Ashe v. Swenson,* 397 U.S. 436 (1970) bars prosecution for Counts IV, VI and VII.

10. That upon information and belief, at the time of the Defendant's Indictment in the District of Colorado, the offenses charged in Counts IV, VI and VII of the Indictment were known to the prosecution and Grand Jury and were not charged.

WHEREFORE, the Defendant prays that this Honorable Court enter an Order dismissing the Indictment as it pertains to this Defendant and for whatever further relief this Court may deem just and proper.

Respectfully submitted,

/s/ EMERSON B. SEMPLE
Lawyer for Howard E. Genser
1570 Emerson Street
Denver, Colorado 80218
Telephone: (303) 832-6777

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 83-60550

UNITED STATES OF AMERICA

Plaintiff,

v.

HOWARD GENSER,

Defendant.

MEMORANDUM OPINION

Defendant has moved for dismissal of the indictment in this case on grounds of double jeopardy and collateral estoppel. Defendant Genser is named in counts I, IV, VI, and VII of the indictment. He argues that the conspiracy alleged in Count I is the same conspiracy for which he was indicted in the District of Colorado in 1982 and, therefore, Count I should be dismissed because of double jeopardy. He further argues that the charges in counts IV, VI and VII (possession of cocaine with intent to distribute on various specific dates) are related to the conspiracy charged in count I, so these counts must be dismissed pursuant to the doctrine of collateral estoppel announced in *Ashe v. Swenson,* 397 U.S. 436 (1970).

Genser was first indicted on June 17, 1982, in the District of Colorado. The indictment, case number 82-CR-134, charged Genser and Shelly Portscheller with five counts:

(1) dispensing cocaine on or about January 19, 1982, in violation of 21 USC § 841(a)(1) (Genser only);

(2) dispensing cocaine on or about February 24, 1982, in violation of 21 USC § 841(a)(1) (Genser and Portscheller);

(3) dispensing cocaine on or about May 18, 1982, in violation of 21 USC § 841(a)(1) (Genser only);

(4) dispensing cocaine on or about May 19, 1982, in violation of 21 USC § 841(a)(1) (Genser only); and

(5) conspiracy to dispense cocaine from January 19, 1982, until May 19, 1982, in violation of 21 USC §§ 846 and 841(a)(1) (Genser, Portscheller, and others unknown to the Grand Jury).

The indictment listed five overt acts in furtherance of the conspiracy alleged in count V:

(1) On January 18, 1982, the defendants met with J. Rzeppa and another and discussed the transfer of narcotics.

(2) On February 24, 1982, the defendants met with T. D. Goodwin and another and discussed the transfer and sale of narcotics.

(3) On January 19, 1982, the defendant, HOWARD ERIC GENSER transferred cocaine to another.

(4) On February 24, 1982, the defendant, SHELLY PORTSCHELLER transferred cocaine to T. W. Goodwin.

(5) On May 18, 1982, the defendant, HOWARD ERIC GENSER discussed the sale of narcotics with T.W. Goodwin and transferred cocaine to T. W. Goodwin.

This indictment was dismissed by the District Court on August 31, 1982, because the government mistakenly charged Genser with "dispensing" instead of "distributing" cocaine.[1]

Shortly thereafter, Genser was reindicted. The second indictment, case number 82-CR-200, was identical to the first, except "distribute" was substituted for "dispense." Genser's motion to dismiss this indictment on grounds of double jeopardy was denied by the District Court. Upon appeal of this denial, however, the Tenth Circuit reversed and remanded to the trial court with instructions to dismiss the indictment. *United States v. Genser*, — F.2d —, No. 82-2458 (10th Cir. May 24, 1983).

The present indictment, the third filed against defendant Genser, charges Genser with four counts:

(1) conspiracy, both to possess with intent to distribute cocaine and to sell and distribute cocaine, from January 1976 through November 3, 1983, in violation of 21 USC §§ 841(a)(1) and 846 (count I);

(2) possession of cocaine with intent to distribute, in violation of 21 USC § 841(a)(1), and aiding and abetting same, in violation of 18 USC § 2(a), in the summer of 1979 (count IV);

(3) possession of cocaine with intent to distribute, in violation of 21 USC § 841(a)(1), and aiding

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[1]Under the definitions in the statute, "dispensing" can only be done by a "practitioner," i.e., someone licensed to distribute a controlled substance. 21 USC § 802. The District Court's order of dismissal was granted because of the government's inability to offer evidence of Genser's status as a practitioner.

and abetting same, in violation of 18 USC § 2(a), on July 3, 1981 (count VI); and

(4) possession of cocaine with intent to distribute, in violation of 21 USC § 241(a)(1), and aiding and abetting same, in violation of 18 USC § 2(a), on July 15, 1981 (count VII).

Genser was also named in eight of the overt acts in furtherance of the conspiracy alleged in count I:

35. During approximately January, 1979, HOWARD GENSER under the direction of FRED COHEN, brought approximately ten ounces of cocaine to Detroit, Michigan.

51. In the latter part of 1980, a courier under the direction of HOWARD GENSER and ROBERT SINGER brought cocaine to Denver, Colorado from Miami, Florida.

60. During approximately February, 1981, FRED COHEN traveled to Denver, Colorado from Detroit where he purchased one half pound of cocaine from HOWARD GENSER and ROBERT SINGER.

61. During approximately March, 1981, under the direction of HOWARD GENSER and ROBERT SINGER, cocaine was delivered to Detroit.

63. On or about June 20, 1981, HOWARD GENSER delivered cocaine to BENNIE PACHECKO in El Paso, Texas.

66. On or about August 7, 1981, a kilogram of cocaine was delivered to ROBERT SINGER, HOWARD GENSER and ALAN LIPTON in Denver, Colorado.

70. On or about January 19, 1982, HOWARD GENSER, Shelly Portscheller and BENNY PACHECKO sold cocaine in Denver, Colorado.

71. On or about February 24, 1982, Shelly Portscheller and HOWARD GENSER delivered cocaine in Denver, Colorado.

Overt acts 70 and 71 are substantially the same as two of those set forth in the earlier indictment.

The Fifth Amendment to the United States Constitution p des that no person shall "be subject for the same offe se to be twice put in jeopardy of life or limb." The traditional test for determining whether two offenses are the "same offense" for double jeopardy purposes, often referred to as the "same evidence test," was set forth by the Supreme Court in *Blockburger v. United States,* 284 U.S. 299, 304 (1932):

> [T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether these are two offenses or only one is whether each provision requires proof of fact which the other does not. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other (citations omitted).

It is well settled that the prosecution of a single conspiracy as two separate conspiracies violates a defendant's double jeopardy guarantee. *Braverman v. United States,* 317 U.S. 49, 53 (1942); *United States v. Tanner,* 471 F.2d 128, 141 (7th Cir.), *cert. denied,* 409 U.S. 949 (1972). The traditional "same evidence," however, is inadequate in criminal conspiracy cases because it fails to protect against multiple prosecutions for the same conspiracy where different indictments allege different overt acts. *United States v. Jabara,* 644 F.2d 574, 577 (6th Cir.

1981); *United States v. Castro,* 629 F.2d 456, 461 (7th Cir. 1980); *United States v. Tercero,* 580 F.2d 312, 315 (8th Cir. 1978). The Sixth Circuit recently emphasized this point in *United States v. Sinito*:

> In recent years courts have recognized the inherent infirmities in applying the same evidence test to conspiracy cases. The government, in a criminal conspiracy case, is often presented with a host of co-conspirators and a multiplicity of overt acts. An overzealous prosecutor, in drafting the indictment, could choose certain overt acts in one indictment and a different set of overt acts in a second indictment, thereby carving up one conspiracy into two or even more artificial offenses. However, such a dissection would circumvent a charge of double jeopardy; since each set of overt acts would require different evidence. The district court recognized this dilemma in the instant case and refrained from applying the same evidence test.
>
> In a conspiracy case it is the agreement which forms the nucleus of the offense. In *Braverman v. United States,* 317 U.S. 49, 53 (1942) the Court said, "[t]he gist of the crime of conspiracy as defined by the statute is the agreement." Therefore, a determination of whether the government can prosecute on more than one conspiracy rests on whether there exists more than one agreement.

— F.2d —, No. 82-3712, slip op. at 8-9 (6th Cir. Dec. 23, 1983).

Where a defendant asserts a non-frivolous claim of double jeopardy, as has the defendant in this case,[2] the

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[2]The cases do not define what is meant by a "non-frivolous claim of double jeopardy." The defendant in this case has

(Continued on next page)

burden shifts to the government to show, by a preponderance of the evidence, that the conspiracies alleged in the two indictments are in fact separate. *United States v. Jabara,* 644 F.2d at 576. Because the denial of a motion to dismiss an indictment on double jeopardy grounds results in an appealable final order, *Abney v. United States,* 431 U.S. 651, 662 (1977), it is proper to hold a pre-trial double jeopardy hearing to create an evidentiary record upon which the trial court can base its decision and of which an appellate court may review. *United States v. Jabara,* 644 F.2d at 576; *United States v. Stricklin,* 591 F.2d 1112, 1117 (5th Cir.), *cert. denied,* 444 U.S. 963 (1979).

In reaching its decision, the trial court may rely upon the indictments[3] and the evidence presented by the parties.[4]

(Continued from previous page)

pleaded that he was earlier indicted for violating the same statute, 21 USC §§ 841(a) (1) and 846; that the earlier indictment charged a conspiracy covering the dates included in the present conspiracy charge; that two overt acts alleged are common to both the earlier indictment and the present indictment; and that the earlier indictment placed defendant "in jeopardy" within the meaning of the fifth amendment. This court holds that defendant Genser has made a non-frivolous claim of double jeopardy.

[3]"Because this case proceeded under Section 846 [of Title 21, USC], it was not mandatory that the indictment charge an overt act. . . . Although the charged overt acts are superfluous, they do serve to describe the offense charged. Therefore, we may examine them for additional insight they provide into the nature and scope of the allegedly separate illicit agreements which the government seeks to punish." *United States v. Marable,* 578 F.2d 151, 155 (5th Cir. 1978).

[4]The defendant may offer his own testimony at the pretrial hearing without waiving the privilege against self-incrimination and his testimony may not subsequently be used against him at the trial on the merits. *United States v. Stricklin,* 591 F.2d at 1118; *United States v. Inman,* 868 F.2d 326, 323 (3d Cir. 1977). *See Simmons v. United States,* — U.S. 377 (1968).

In meeting its burden of persuasion, "'the government is not compelled to come forward with any particular kind of evidence. It may present, however, as much or little evidence as it deems advisable, subject, of course, to dismissal of the indictment if not enough evidence to rebut the defendant's prima facie showing is introduced.'" *United States v. Sinito,* slip op. at 22 (quoting *United States v. Stricklin,* 591 F.2d at 1119).

Since this is a criminal conspiracy case, the Court will not apply the "same evidence" test. The test to be applied, often called the "totality of the circumstances test," was discussed in some detail by the Sixth Circuit in *United States v. Sinito.*

> The Totality of Circumstances Test
>
> The district court found these indictments were based upon separate conspiracies by applying the totality of circumstances test set forth in *United States v. Jabara,* 644 F.2d 574 (6th Cir. 1951). In *Jabara,* the defendants had been indicted in Michigan for conspiracy to violate the narcotics laws. These same defendants had been previously indicted in California for conspiracy to violate the same drug laws. The court dismissed the conspiracy count on grounds that both indictments arose from one conspiracy. The trial court considered the totality of the circumstances test and found there was but one conspiracy. This Court agreed. Such an approach has been applied by a number of circuits. *United States v. Castro,* 629 F.2d 456 (7th Cir. 1980); *United States v. Tercero,* 580 F.2d 312 (8th Cir. 1978); *United States v. Marable,* 578 F.2d 151 (5th Cir. 1978); *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975). The test requires the trial court, in determining whether two conspiracies arise from a single agreement, to consider the elements of: 1)

> time; 2) persons acting as co-conspirators; 3) the statutory offenses charged in the indictments; 4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case; and 5) places where the events alleged as part of the conspiracy took place. *See United States v. Stricklin,* 591 F.2d 1112 (5th Cir.), *cert. denied,* 444 U.S. 963 (1979); *United States v. Marable,* 578 F.2d at 154. Where several of these factors differ between the conspiracies, the conclusion follows that the alleged illegal conspiracies are separate and distinct offenses. *United States v. Marable, supra; United States v. Mallah,* 503 F.2d at 971.

— F.2d at —, No. 82-3712, slip op. at 9-10.

In balancing the five elements set forth above, the Court must be mindful of two basic tenets of conspiracy law: first, an alleged co-conspirator may be indicted in an overall agreement without knowing all of the participants in the conspiracy or the details of the plan of operation; and second, new conspirators may join the criminal agreement after its inception, and others may terminate their membership in the conspiracy before its completion. *United States v. Castro,* 629 F.2d 456, 464 (7th Cir. 1980).

A pretrial double jeopardy hearing was held in this case on January 13, 1984. The government produced only one witness and otherwise relies on its brief and the indictments at issue. The defendant did not produce any evidence but for the first indictment and the Tenth Circuit's opinion on the second indictment.

The government's witness, Shelley Portscheller, was Genser's co-defendant in the earlier indictment. She is

also named, but is not indicted, in the present indictment. She testified that she first met Genser in 1981. She lived with Genser for one month in April or May of 1981 and again from November 1981 until April 1982 in Denver, Colorado. On this latter occasion, Robert Singer and John Clooner [phonetic] also lived in the same house with Portscheller and Genser. Singer is named as a co-defendant in the present case. The four of them used cocaine together and Portscheller was aware that Genser was a seller of the drug, although Genser did not discuss with her the source of his cocaine.

Portscheller admitted participation in only one drug transaction. On February 24, 1982, Genser confronted Portscheller behind the closed doors of their bedroom and asked her to carry an envelope containing cocaine to Vicky Hirsch. Portscheller agreed to deliver the drugs, did so, and was subsequently arrested. This is part of the conspiracy alleged in the first indictment. Furthermore, the government concedes that this is overt act 71 of the present indictment and that the cocaine delivered was some of the same cocaine which the defendants in the present case are alleged to have conspired to distribute.

Defendant Genser argues that the conspiracy charged in the earlier indictment was a small piece of the grand conspiracy charged in the present indictment. Applying the five factors set forth in *United States v. Sinito,* the Court agrees with the defendant that there is but one alleged conspiracy.

First, the time of the alleged Colorado conspiracy, from January 19, 1982, until May 19, 1982, is totally encompassed within the time of the present alleged con-

spiracy. Second, the government has failed to prove that the allegedly separate conspiracies did not involve the same participants. Because the first indictment alleged that Genser and Portscheller conspired with "other persons whose true identity is to the Grand Jury unknown," the non-identity of the named conspirators does not establish that there was no overlap in personnel. *United States v. Mallah,* 503 F.2d 971, 983 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975). Nor does the fact that Portscheller did not know most of the other alleged co-conspirators named in the present indictment prevent this from constituting a single conspiracy.[5] *Blumenthal v. United States,* 332 U.S. 539, 557 (1947). Third, the statutory offenses charged in the indictments are the same. Fourth, the overt acts charged and the offenses described in the earlier indictment are encompassed within the present indictment. The fact that the present indictment names Genser in overt acts as early as January 1979 and charges that the conspiracy commenced in 1976 does not demonstrate that the offenses alleged in the earlier indictment to have occurred in January to March 1982 were not part of the same overall conspiracy. Fifth, the first indictment charged a conspiracy in the State of Colorado while the present indictment charges that the conspiracy occurred in many states, including Colorado.

The evidence discloses that the offenses charged in the conspiracy counts of the indictment are but one con-

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[5]Portscheller testified that she had been introduced to a man named Leo. Leo was described to her as the accountant for Genser's business, Howie's Hot Dogs, and she knew that Genser, Singer, and Leo were in business together. Leo, presumably, is Leo J. Radosta, the head of the conspiracy charged in the present indictment.

spiracy. Portscheller agreed with Genser to distribute cocaine in Denver, Colorado, on February 24, 1982. Whether she knew it or not, she thus joined a conspiracy of which it is alleged Genser was already a participant. Genser was indicted and in jeopardy for this conspiracy with Portscheller, and since this is the same conspiracy for which he is presently charged, he may not be put in jeopardy again. The conspiracy count against Genser must, therefore, be dismissed.

The court must next decide whether the doctrine of collateral estoppel bars Genser's prosecution for the substantive offenses charged in counts IV, VI, and VII of the present indictment. These counts charge Genser with possession with intent to distribute cocaine, 21 USC § 841 (a) (1), and aiding and abetting, 18 USC § 2(a), on or about the summer of 1979, July 3, 1981, and July 15, 1981, respectively. The defendant relies upon *Ashe v. Swenson,* 397 U.S. 436 (1970), and *United States v. Castro,* 629 F.2d 456, 461 (7th Cir. 1980).

In *Ashe v. Swenson,* the Supreme Court held that the doctrine of collateral, as first developed in civil litigation, is applicable in criminal cases as a matter of constitutional law. 397 U. S. at 445. Where an issue of ultimate fact has been resolved in a defendant's favor by a valid and final judgment in a prior proceeding between the identical parties, collateral estoppel bars further prosecution based upon that fact. *Id.* at 443. In *United States v. Castro,* the Seventh Circuit discussed the applicability of collateral estoppel in a case such as this:

> A defendant who argues that *Ashe* is applicable to his case carries the burden of establishing that the issue he seeks to foreclose from consideration in the second case was "necessarily" resolved in his favor

> in the prior proceeding. *United States v. Seijo,* 537 F.2d 694, 697 (2d Cir. 1976), *cert. denied,* 429 U.S. 1043, 97 S.Ct. 745, 50 L.Ed.2d 756 (1977). "The burden is particularly onerous where the acquittal in the first trial involves the crime of conspiracy." *United States v. Clark,* 613 F.2d 391, 400 (2d Cir. 1979). The court, in determining what issues were necessarily resolved in the first trial, should inquire "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe v. Swenson, supra,* 397 U.S. at 444, 90 S.Ct. at 1394. The court's inquiry should be practical, examining "the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Id.*

629 F.2d at 465.

The government argues that the issues raised by counts IV, VI, and VII, were not fully litigated in the disposition of the earlier indictment. The government also relies upon policy statements in *Standefer v. United States,* 447 U.S. 10 (1980).[6]

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[6]In *Standefer v. United States,* 447 U.S. 10 (1980), the Supreme Court held that the doctrine of nonmutual collateral estoppel did not bar the defendant's prosecution as an aider and abettor where the alleged principal in the underlying offense was earlier acquitted. The present case, however, does not involve nonmutual collateral estoppel since Genser was the defendant in both indictments. *Standefer* did not address the constitutional dimensions of collateral estoppel developed in *Ashe v. Swenson* and its progeny. The Court in *Standefer* merely held that the competing policy considerations involved in a criminal case outweigh the concerns of judicial economy that undergird the estoppel doctrine. 447 U.S. at 25. Where, as here, the defendant's collateral estoppel claim is based upon the constitutional privilege against double jeopardy, the policy considerations discussed by the Court in *Standefer* are inapplicable. *See also United States v. Johnson,* 697 F.2d 735, 739 (6th Cir. 1983) (extent of the application of the estoppel doctrine depends upon whether defendant raises double jeopardy issue).

The Court's holding above requires that the government is collaterally estopped from introducing any evidence in this case concerning Genser's membership in a conspiracy to distribute cocaine. *United States v. Castro,* 629 F.2d at 465. Under *Ashe,* the government is constitutionally foreclosed from relitigating the conspiracy issue in this case. *Id.*

The offenses charged in counts IV, VI, and VII of the present indictment, however, were not litigated in the dismissal of the earlier indictment. These offenses were not alleged in the earlier indictment. The first indictment was dismissed on factual grounds, i.e., the government was unable to offer evidence of one of the elements of the offenses charged. *United States v. Genser,* — F.2d —, No. 82-2458, slip op. at 4-5 (10th Cir. May 24, 1983).